80-561

No. 80-

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROL DATA CORPORATION,
Petitioner,

v.

POTTER INSTRUMENT CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a U.S. Circuit Court of Appeals should take jurisdiction and consider the merits of an appeal from a U.S. District Court where the appellant-respondent failed to file a notice of appeal within the 30 days after final judgment allowed by 28 U.S.C. § 2107, that period not being tolled due to a defect in a motion for rehearing, the defect being the failure to describe the grounds for the rehearing within the 10 days allowed by Fed. R. Civ. P. 59.

2. Is counsel to be allowed to file a "skeletal" post-trial motion for rehearing lacking any statement in particularity of grounds therefor and to later fill it in after the inextensible ten-day limitation has lapsed to thereby enlarge the time for appeal?

PARTIES TO THE PROCEEDING BELOW

Only the parties named in the caption are parties to the suit in which this petition is filed. There are four related suits in the Court below, having the same plaintiff Potter Instrument Company as here against other defendants Sperry Corporation, Telex Computer Products, Incorporated and Storage Technology Corporation. The Court of Appeals has consolidated all of these cases under No. 80-1428.

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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROL DATA CORPORATION,
Petitioner,

v.

POTTER INSTRUMENT CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

As of date, petitioner is unaware of publication of any of the opinions delivered below in either official or unofficial reports.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Date Of Decree Sought To Be Reviewed And Time Of Its Entry

Petitioner prays that a writ of certiorari issue to review the decree dated and entered on August 12, 1980 by the United States Court of Appeals for the

Fourth Circuit in civil case number 80-1428, denying petitioner's motion to dismiss respondent's appeal on grounds of untimeliness of appeal and lack of jurisdiction, the appeal having been originally taken from a judgment of the United States District Court for the Eastern District of Virginia (Alexandria Division) dismissing respondent's patent infringement action for laches and estoppel. The judgment of the District Court was rendered March 12, 1980 and entered on March 25, 1980.

Date Of Any Order Respecting A Rehearing

In regard to the decree of the Court of Appeals entered on August 12, 1980 denying petitioner's motion to dismiss appeal, no order has issued concerning a rehearing.

In regard to the judgment of the District Court entered on March 25, 1980 dismissing respondent's patent infringement action below, the District Court, after a hearing on May 16, 1980, entered an order on May 23, 1980 denying the respondent's motion for rehearing under Fed.R.Civ.P. 59.

Statutory Provision Believed To Confer On This Court Jurisdiction To Review The Decree In Question

This petition for a writ of certiorari was filed within ninety days of the date of the order of the Court of Appeals denying petitioner's motion to dismiss appeal in compliance with 28 U.S.C. § 2101(c). The jurisdiction of this Court to review the order is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES WHICH THIS CASE INVOLVES

28 U.S.C. § 2107 (in pertinent part):

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

Fed.R.App.P. 4(a)(4):

> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Fed.R.Civ.P. 6(b):

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Fed.R.Civ.P. 7(b)(1):

> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Fed.R.Civ. P. 52(b)(in pertinent part):

> Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made pursuant to Rule 59.

Fed.R.Civ.P. 59(e):

> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Fed. Local R. 11(f)(E.D.Va.) (in pertinent part):

> Briefs Required. (1) All motions, unless otherwise directed by the Court and except as noted herein below in Subsection 11(f)(2), shall be accompanied by a written brief setting forth a concise statement of facts and supporting reasons, along with a citation of the authorities upon which the movant relies. . . . (2) Briefs need not accompany motions (a) for a more definite statement, (b) for an extension of time to respond to pleadings, unless the time has already expired and (d) solely related to discovery matters, except as set forth in Local Rule 11-1(E), (F) and (I).

CONCISE STATEMENT OF THE CASE

Respondent filed civil action against petitioner for alleged infringement of U.S. letters patent in the United States District Court for the Eastern District of Virginia (Alexandria Division), the basis for federal jurisdiction being 28 U.S.C. 1338(a).

The District Court entered a judgment dismissing the complaint on March 25, 1980,[1] and the plaintiff purported to move for a rehearing under Fed.R.Civ.P. 59 on the 10th day thereafter, April 4, 1980. However, the motion that plaintiff had filed within the 10 days allowed under Fed.R.Civ.P. 59 provided no particular grounds for the motion. The motion is in the Appendix hereto at page 24a. The grounds were filed in a separate paper filed on May 2, 1980, which was after the allowed 10 days, and indeed was after the 30 days allowed for an appeal under 28 U.S.C. 2107. After the District Court denied the motion for rehearing, the plaintiff (respondent here) filed its notice of appeal on June 19, 1980, which was long after the 30 days from entry of judgment allowed under 28 U.S.C. 2107.[2]

Upon the notice of appeal being filed, petitioner filed a motion to dismiss the appeal with the Court of Appeals on July 1, 1980 on the ground of lack of jurisdiction in the Court of Appeals due to the untimely filing of the notice of appeal, with an explanation of the defect in the motion for rehearing. On

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[1] This was the date when findings and conclusions were filed to complete the judgment filed on March 12, 1980.

[2] Defendant (petitioner here) also had moved the District Court for dismissal of the plaintiff's motion for rehearing due to the defect, but that motion was not acted upon inasmuch as the Court denied the motion for rehearing on its merits.

August 12, 1980, the Court of Appeals denied the motion to dismiss without giving any reasons for its action. The order of denial appears on page 1a of the Appendix hereto. The appeal remains pending as of this date. This petition is for urgently soliciting this Court to now review and reverse the dismissal of the motion to dismiss the appeal so that the Court of Appeals' error in assuming jurisdiction can be timely corrected.

The following chronology of procedural events below is provided for the convenience of this Court.

On *March 12, 1980* the U.S. District Court for the Eastern District of Virginia (Alexandria Division) entered an order dismissing respondents patent infringement civil action against petitioner on grounds of laches and equitable estoppel.[3] The order did not include Findings and Conclusions. A copy order appears at pages 3a-4a of the Appendix.

On *March 19, 1980* respondent filed a "Motion for Rehearing" under Fed.R.Civ.P. 59 alleging that "the Court had committed manifest error of law and fact." No brief accompanied respondent's motion. A copy appears at page 22a of the Appendix.

On *March 25, 1980* the U.S. District Court entered Findings and Conclusions to its Dismissal Order of March 12, 1980. A copy appears at pages 5a-18a of the Appendix.

On *April 4, 1980* respondent filed a "Revised Motion for Rehearing and to Vacate Summary Judg-

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[3] The order also dismissed four other cases that had been consolidated with the petitioner's case because they all involved the same patents.

ment" under FRCP 59(e), the paper providing only general averments as to the nature of the grounds for the Motion. Again, no brief accompanied respondent's revised motion. A copy appears at page 24a of the Appendix. April 4 was the 10th day after March 25.

On *April 11, 1980* a thirty-day period expired from the date when the District Court dismissed the action.

On *April 24, 1980* a thirty-day period expired from the date when the District Court entered its findings and conclusions.

On *May 2, 1980* respondent filed a "Brief in Support of Motion for Rehearing" setting forth the particular grounds for the Motion for Rehearing.

On *May 9, 1980* the District Court set May 16, 1980 as date for hearing on respondent's motion.

On *May 15, 1980* petitioner, with co-defendants, filed and served a "Joint Motion to Strike Plaintiff's Motion for Rehearing" and "Memorandum of Points and Authorities", on the ground that the motion filed April 4, 1980 was defective in lacking recital of the grounds for the motion.

On *May 16, 1980* the District Court heard argument by counsel on repondent's motion.

On *May 23, 1980* the District Court entered an order denying respondent's motion. A copy appears at pages 19a-20a of the Appendix.

On *June 19, 1980* respondent filed and served a notice of appeal of the dismissal of its patent infringement action.

On *July 1, 1980* petitioner filed and served an "Appellee's Motion to Dismiss Appeal" and "Appellee's

Memorandum in Support of Motion to Dismiss Appeal." A copy of the motions appears at pages 31-32a of the Appendix. (No copy of the Memorandum in Support is included here because it was essentially the same as the argument presented hereinbelow.)

On *July 9, 1980* respondent filed and served a "Brief Opposing Motion to Dismiss."

On *August 12, 1980* the Court of Appeals for the Fourth Circuit entered an Order denying various motions to dismiss appeals including petitioner's. A copy appears at page 1a of the Appendix.

AMPLIFICATION OF REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Decision Is Of Imperative Public Importance Justifying Immediate Settlement By The Court

Petitioner is well aware of the provisions of Rule 18 of this Court that certiorari will not be granted before final judgment of the Court of Appeals unless the case is "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." We submit that just that sort of case is presented. Given the enormous overloading of the Federal Courts, it is imperative to the public good that our system of justice not be bogged down with cases pending because statutes and rules on timely taking of steps in the courts are ignored.

The questions presented touch upon important aspects of federal jurisdiction, procedure and practice which, if not resolved at this time, will only invite reoccurrence. The central aspect of the question is

whether the filing of skeletal post-trial motions in clear noncompliance with the Federal Rules of Civil Procedure is to be condoned as an effective means for extending the period for filing notices of appeal and for obviating the strict ten-day limitation for filing post-trial motions. The Circuits have split on the issue.

Moreover, if the rulings below were allowed to stand the doctrine of finality of judgment and the interests it serves would be adversely affected, as further explained below.

The Court has often exercised its power of supervision over the administration of justice in the Federal Courts, especially where, as here, the issues presented raise important questions of federal appellate jurisdiction, conflict among the Circuits and standards of federal practice. *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 153, 34 L.Ed.2d 375 (1972), 93 S.Ct. 408 (1972).

Prior Decisions Of This Court

On many occasions heretofore this Court has made clear that time limitations for filing a notice of appeal are mandatory, jurisdictional and to be strictly applied, e.g. *Browder* v. *Director, Ill. Dept. of Corrections,* 434 U.S. 257 at 264, 54 L.Ed.2d 521, 98 S.Ct. 556 (1978); *United States* v. *Robinson,* 361 U.S. 220, 229, 4 L.Ed.2d 259, 80 S.Ct. 282 (1960). See also *Fallen* v. *United States,* 378 U.S. 139, 12 L.Ed.2d 760, 84 S.Ct. 1689 (1964); *Coppedge* v. *United States,* 369 U.S. 438, 442, 8 L.Ed.2d 21, 82 S.Ct. 917 (1962); *United States* v. *Schaefer Brewing Co.,* 356 U.S. 227, 2 L.Ed.2d 721, 78 S.Ct. 674 (1958); *Matton Steamboat Co.* v. *Murphy,*

319 U.S. 412, 415, 87 L.Ed. 1483, 68 S.Ct. 1126 (1943); *George* v. *Victor Talking Mach. Co.*, 293 U.S. 377, 379, 79 L.Ed. 439, 55 S.Ct. 229 (1934), 73 ALR2d 235 (1958). This Court has also continued to recognize that any other approach would defeat the time limitation's central purpose of providing finality to judgment. *Browder, supra* at 264; *Matton Steamboat, supra,* at 415.

Fed. Rule App. Proc. 4(a)(4) allows for the running of the time limitations to be tolled by a *timely* motion filed in the district court pursuant to Fed.R.Civ.P. 52 (b) or Rule 59. *Browder, supra* at 264. Under those rules a ten-day limitation is allowed for filing the respective motions, the District Court being prohibited from enlarging same under Fed.R.Civ.P. 6(b). *Lapiczak* v. *Zaist,* 451 F.2d 79 (2nd Cir. 1971).

Insofar as these provisions touch upon the jurisdictional matter of timeliness of appeal, they too should properly be accorded strict interpretation and application by the lower courts and parties to suit. *Browder, supra.*

However, the case presented here is one where the respondent managed to perpetuate its case and take an untimely appeal by a procedural mechanism which is in clear and substantial non-compliance with the federal rules of procedure. The procedural mechanism it used was a simple one: it merely filed a purported post-trial motion stylized under Fed.R.Civ.P. 59(e) within the inextendible ten-day limitation allowed under the rule, but without setting forth in particularity any ground therefor as required by Fed.R.Civ.P. 7(b). (hence the name "skeletal" motion for its lack of substance). The offending counsel then took as long as he

desired to file his papers or briefs setting forth grounds. In the case presented, this act was done long after the lapse of the ten-day limitation on the motion and after the lapse the 30-day limitation allowed for an appeal from entry of judgment.[4]

A Conflict Among The Circuits Exists

In the First, Second, Third, Fifth, Seventh and District of Columbia Circuits, such irregularity in a post-trial motion would not toll the running of the period for filing notice of appeal. Thus, an appeal such as the one here would have been dismissed as untimely. *See* e.g., *Martinez* v. *Trainor,* 556 F.2d 818 (7th Cir. 1977). The rule in these Circuits is one of "strict" application, that neither a belated motion nor a motion without reasons can give the trial court the jurisdiction necessary to hear and act on such motion, thereby enlarging the time for appeal. *Martinez* v. *Trainor, supra* at 821, citing *Fine* v. *Paramount Pictures, Inc.,* 181 F.2d 300, 304 (7th Cir. 1950), *accord, Safeway Stores, Inc.* v. *Coe,* 78 U.S. App. D.C. 19, 136 F.2d 771, 773 (1943); *Jusino* v. *Morales & Tio,* 139 F.2d 946 (1st Cir. 1944); *Virginia Land Co.* v. *Miami Shipbuilding Corp.,* 201 F.2d 506

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[4] The civil action against petitioner was final and appealable under 28 USC § 1291 as of March 25, 1980, no counterclaims being presented. The fact that the District Court had consolidated the five cases for discovery did not extend the date for appeal of the petitioner's case, see *Johnson* v. *Manhattan R. Co.,* 289 U.S. 479-496-97, 77 L.Ed. 1331, 53 S.Ct. 721 (1933), in which the Court held that consolidation does not merge cases. See also *Waldron* v. *Cities Service,* 361 F.2d 671, 672 (2nd Cir. 1966), *aff'd* 391 U.S. 253, 20 L.Ed.2d 569, 88 S.Ct. 1575 (1968); *Massachusetts Helicopter, Petitioner,* 469 F.2d 439 (1st Cir. 1972). The non-merger of consolidated cases also is recognized in *DeGraffenreid* v. *General Motors Assembly Division,* 558 F.2d 480 (8th Cir. 1977).

(5th Cir. 1953); *Raughley* v. *Pennsylvania R.R.*, 230 F.2d 387 (ed Cir. 1956); *Edwards* v. *Doctors Hospital, Inc.*, 242 F.2d 888 (2d Cir. 1957); *see also, Marshall's U.S. Auto Supply, Inc.* v. *Cashman*, 111 F.2d 140, at 141-42 (10th Cir. 1940); *cert. den.*, 311 U.S. 667, 85 L.Ed. 428, 61 S.Ct. 26 (1940), wherein the court ruled that a plaintiff's motion for new trial which merely recited general averments as grounds therefor did not provide the lower court proper basis to act on the motion.

However, the Fourth and Ninth Circuits have taken the conflicting stance. In these Circuits irregular post-trial motions filed without statements of grounds therefor are nonetheless allowed to toll the period for filing notice of appeal in order to allow otherwise untimely appeals to be taken. See, *Witt* v. *Merrill*, 208 F.2d 285 (4th Cir. 1953); *Yanow* v. *Weyerhauser Steamship Co.*, 274 F.2d 274 (9th Cir. 1959).

In *Witt* v. *Merrill*, the Fourth Circuit explained its reasons for taking this stance, the first being that since the Rules of Civil Procedure are to be liberally construed, to deny appellate review because grounds were not stated in a post-trial motion would be enforcement of a technicality in contravention of the spirit of the rules; and second, that the mere filing of a post-trial motion, albeit irregular or otherwise in non-compliance with the rules, is sufficient notice to the opposing party that the moving party intends to appeal.

As to the latter point, it would seem strange indeed that liberal interpretation of the Federal Rules of Civil Procedure would be allowed to go so far as to make an irregular post-trial motion a surrogate notice

of appeal. Likewise, it does not seem realistic to insist that a post-trial motion lacking any statement of grounds therefor informs the recipient counsel at time of receipt that the moving party intends to appeal.

Of more importance, however, is the Fourth Circuits' misplaced adherence to the position that liberal interpretation of the federal rules is appropriate here. As stated above, this Court has time and again insisted that federal statutes and rules touching upon timeliness of appeal are to be strictly applied because of the manadatory jurisdictional nature of same. As this Court has explained:

> "the purpose of the rule is clear: it is 'to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.' *Browder,* supra. at 264."

In this vein, it can be seen that the liberal approach of the Fourth and Ninth Circuits frustrates the above stated purpose by allowing untimely filed appeals to be entertained. Moreover, this approach unfairly favors the non-complying party by allowing his interest in taking an untimely appeal to prevail over the other party's competing interest in finality of judgment. If any party is to be caused inconvenience or loss as a result of one party's failure to comply with the rules, it should be the non-complying party, not the other.

Thus, the Fourth and Ninth Circuits' stance on the issue perpetuates an unnecessary split in the Circuits, violates principles of fairness, and runs contrary to previous directives from this Court.

Moreover, to allow the reasoning of the Fourth and Ninth Circuits to stand will act only to allow a barrage of late filed appeals to be taken. In these days of highly loaded appellate dockets, such practice should not be allowed to stand. As the court observed in *Martinez, supra,* at 820:

> ". . . if a party could file a skeleton motion and later fill it in, the purpose of the time limitation would be defeated. 'Casting this substantial doubt on the finality of judgment would increase the burdens of an already overloaded federal judiciary.' 9 Moore's Federal Practice § 204.13[2], at 978."

CONCLUSION

For the reasons stated above, petitioner respectfully urges that a writ of certiorari be issued.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1428

POTTER INSTRUMENT COMPANY, INC.,
Appellant,

versus

STORAGE TECHNOLOGY CORPORATION, ET AL,
Appellees.

ORDER

(Filed Aug. 12, 1980)

Upon consideration of the motions to dismiss appeal and the responses to the motions, by counsel,

IT IS ORDERED that the motions to dismiss the above appeal are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Sprouse and Judge Ervin.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 79-579-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

STORAGE TECHNOLOGY CORPORATION, *Defendant*.

Civil Action No. 79-626-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

TELEX COMPUTER PRODUCTS, INC., *Defendant*.

Civil Action No. 79-993-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

TELEX COMPUTER PRODUCTS, INC., *Defendant*.

Civil Action No. 79-994-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

SPERRY CORPORATION, *Defendant*.

Civil Action No. 79-995-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

CONTROL DATA CORPORATION, *Defendant*.

ORDER

(Filed March 12, 1980)

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Upon examination of the voluminous documents filed herein and after careful consideration of the evidence submitted by the parties in support of their respective positions, and upon argument of counsel—the Court is of the opinion that the defendants' joint and several motions to dismiss these consolidated infringement suits on the grounds of laches and equitable estoppel ought to be GRANTED, and

It Is So Ordered.[1]

This without prejudice to Potter's right to pursue its currently pending parallel infringement suits against the United States and these defendants[2] in the United States Court of Claims, if it be so advised.

The Clerk is directed to send a copy of this Order to the Honorable Francis C. Browne of the United States Court of Claims, and to all counsel of record.

United States Senior District Judge
/s/ OREN R. LEWIS

March 12, 1980

All pretrial discovery has been completed—this controversy is now overripe for settlement[3] and/or trial on the merits in the Court of Claims as soon as that Court's docket permits.

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By /s/ DOREEN JONES
Deputy Clerk

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[1] The Court will file its findings and conclusions in the next week or so.

[2] They were made third-party defendants in the Court of Claims suit in 1978.

[3] Hearing on the several pending motions for sanctions will be deferred until this case is settled and/or set for trial in the Court of Claims.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 79-579-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

STORAGE TECHNOLOGY CORPORATION, *Defendant*.

Civil Action No. 79-626-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

TELEX COMPUTER PRODUCTS, INC., *Defendant*.

Civil Action No. 79-993-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

TELEX COMPUTER PRODUCTS, INC., *Defendant*.

Civil Action No. 79-994-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

SPERRY CORPORATION, *Defendant*.

Civil Action No. 79-995-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

CONTROL DATA CORPORATION, *Defendant*.

FINDINGS AND CONCLUSIONS

(Filed March 25, 1980)

These suits were brought by the Potter Instrument Company, Inc. (Potter) against Storage Technology Corporation (STC),[1] Telex Computer Products, Inc. (Telex),[2] Sperry Corporation (Sperry),[3] and Control Data Corporation (CDC)[4] charging the defendants with infringement of United States Letters Patent No. 3,176,894 ("the '894 patent") by making, using and selling magnetic tape drives employing an "industry standard Z buffer" and United States Letters Patent No. 3,226,685 ("the '685 patent") by making, using and selling magnetic tape recording systems employing Group Coded Record (GCR) adopted as an industry-wide standard by the American National Standards Institute (ANSI).

The defendants claimed these patents were invalid and denied the claimed infringement.

A parallel proceeding is currently pending in the United States Court of Claims. The Court of Claims proceeding was instituted on March 24, 1978 when Potter filed suit against the United States Government alleging infringement of the '894 and '685 patents in connection with the United States Government's use of computer equipment and tape drives supplied by STC, Telex, Sperry and CDC. The defendants were made third-party defendants.

These consolidated cases came on for hearing on the joint and/or individual motions of the defendants for summary judgment on the basis of, *inter alia,* file wrapper estoppel, laches, and equitable estoppel.

The Court declared the file wrapper estoppel claim premature and scheduled the laches and estoppel issues for further hearing.

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[1] Civil Action No. 79-579-A (filed July 6, 1979).

[2] Civil Action Nos. 79-626-A and 79-993-A (filed July 24, 1979 and November 21, 1979, respectively).

[3] Civil Action No. 79-994-A (filed November 21, 1979).

[4] Civil Action No. 79-995-A (filed November 21, 1979).

Detailed memoranda of points and authorities, together with voluminous exhibits and live testimony, were submitted by each of the parties in support of their respective positions.

From the record thus made, the Court finds that the '894 patent was issued to Robert E. Schoeneman as inventor on April 6, 1965. This patent, allegedly covering "industry standard Z buffer" magnetic tape drives, was owned by Potter during the time period relevant to this consolidated action.

The '685 patent, allegedly covering the industry standard "GCR" recording and information storage technique, was also owned by Potter during the relevant time period.

Although the record is silent as to when, if ever, Potter began manufacturing and marketing its Z buffer tape drive and GCR recording equipment, it had bulk paid-up licensing agreements with IBM and other manufacturers covering both the '894 and '685 patents as early as 1971.

In early 1970, Potter had actual and/or constructive notice that each of the defendants had developed and were selling tape drives utilizing the accused industry standard Z buffer and, later, the GCR technique.

STC introduced its first magnetic tape drive employing an industry standard Z buffer at the Atlantic City National Computer Conference in the spring of 1970—this conference was attended by Potter representatives. STC sold its first Z buffer tape drive in late 1970.

Beginning in 1970, STC undertook a marketing program for its tape equipment which included low profit sales to original equipment manufacturers (OEMs).

On December 1, 1971, Potter wrote to STC concerning possible infringement of the '894 patent. Subsequent corresponding relating to the '894 patent between Potter's patent counsel and STC's patent counsel followed during

1972. This correspondence terminated with a letter dated January 17, 1973—nothing more was heard from Potter regarding the '894 patent until this suit was filed in 1979.

On March 8, 1973, STC publicly announced its GCR tape recording system—a copy of which announcement was received by Potter. On May 17, 1973, George W. May, then president of Potter, wrote to STC stating that the '685 patent covered the fundamental concept of GCR and offered STC a license under the '685 patent.

STC began selling its tape drives employing GCR technology after the March 8, 1973 announcement, for delivery in the fourth quarter of 1973. In March 1974, John T. Potter reported to the Potter Board of Directors that STC was infringing its '685 patent—no legal action was undertaken by Potter against STC for patent infringement until the filing of this suit in 1979.

Telex publicly announced its Z buffer tape drive in May 1970 and subsequently made shipments to customers in the latter part of 1970.

Potter first contacted Telex regarding the '894 patent in a letter dated November 10, 1971, in which Potter directed Telex's attention to the '894 patent. An exchange of correspondence followed which included a letter from Telex's patent counsel denying infringement of the '894 patent and a letter dated October 25, 1972 from Potter threatening immediate legal action if Telex did not take a license under the '895 patent. Nothing further was said or done regarding the '894 patent until this suit was filed in 1979.

In May 1975, Telex negotiated for and purchased Potter's United Kingdom assets for approximately $500,000.00. Potter neither claimed nor mentioned infringement of its '894 patent during these negotiations.

The record is devoid of evidence concerning precisely when Telex introduced and began marketing its GCR tape

equipment. However, the undisputed evidence discloses that Potter became aware of Telex's GCR equipment and the possibility that Telex might be infringing on its '685 patent in 1976—as evidenced by the exchange of correspondence between Potter and Telex with regard to the '685 patent initiated by Potter's letter of February 13, 1976 and terminated by Telex's letter of February 3, 1977.

On November 10, 1970, Sperry Univac issued a press release to approximately 75 magazines and trade journals announcing the introduction of the accused Sperry Univac Uniservo-20 tape drive. This tape drive, which employs the accused Z buffer, was given wide publicity at trade shows following the November announcement.

On December 31, 1971, the Sperry Univac Division of Sperry acquired the computer business and operations of the RCA Corporation in a widely publicized transaction. RCA had earlier acquired a paid-up license under numerous Potter patents, including the '894 patent.

CDC issued press releases to the computer industry regarding its own Z buffer tape drive no later than August 22, 1973. On or before September 27, 1973, CDC had begun leasing the accused Z buffer tape drive. As of the time of the press releases, Potter knew or should have known that CDC was marketing the accused Z buffer tape drives.

Potter never asserted any infringement claim under the '894 patent against CDC until the filing of this suit in 1979.

With respect to the GCR patent, in November 1973, the ANSI Subcommittee X3B1 received a proposal from IBM —which was licensed by Potter under the '685 patent—for adoption of GCR recording as an industry-wide standard. GCR is allegedly an infringement of the '685 patent in suit. Representatives of Potter attended the November 1973 ANSI subcommittee meeting but did not disclose

Potter's ownership of the '685 patent or any other patents relating to the proposed GCR standard.

ANSI Subcommittee X3B1 formulates industry-wide standards for magnetic tape information interchange systems. The Subcommittee had a written policy, of which all members were aware, stating that when any one or more patents are to be included within a proposed industry standard, the owner of such patent[s] must bring to the attention of the Subcommittee the existence of such patents and agree to offer licenses to members of the affected industry on reasonable and nondiscriminatory terms as a prerequisite to the adoption of the industry-wide standard. This policy was adopted to allow all industry members an equal opportunity to utilize any industry-wide standard adopted.

The GCR recording was adopted as the industry-wide standard in June of 1976.

During the time periods relevant to this suit, Potter was fully cognizant of the methods used to protect one's patents and patent rights. On January 2, 1970, it instituted a suit against Bucode, Inc. for infringement of, *inter alia,* its '894 patent (184 U.S.P.Q. 662 [1975]). After protracted litigation, the '894 patent was held valid by the District Court—this suit was compromised and settled pending appeal.

Potter took no action against any of the alleged infringers, either during or after the conclusion of the Bucode suit, prior to filing the Court of Claims' suit against the United States.

Potter's economic survival reached the acute stage in late '73 or early '74—many of its patents, including the '894 and '685 patents, were assigned to the Midland Bank of New York as security for bank loans—Alexander was employed as its financial consultant in late 1974, and the Company filed its petition for a Chapter XI Bankruptcy in

April 1975. Potter remained as debtor in possession with Alexander as its new president.

None of these infringement claims were listed as assets or choses in action in Potter's Chapter XI Bankruptcy petition.

Alexander neither petitioned the Bankruptcy Court nor took any action as debtor in possession against any of these defendants in re their right to continue using the '894 or the '685 patents, even though the Potter Board of Directors had been advised by one of its patent advisors that failure to so do might give rise to the defense of laches.

Instead, Potter sought and obtained permission from the Bankruptcy Court to employ counsel on a contingent basis to bring suit against the United States in the Court of Claims for infringement of its '894 and '685 patents—in the hopes that the Government would bring in the defendants as third-party defendants and force a settlement—which was done in a similar suit filed against the United States in the Court of Claims.

Suit was filed against the United States in the Court of Claims on March 24, 1978, and the Government gave notice of the suit to these defendants in September 1978.

Potter changed counsel in the Court of Claims' suit—and he recommended that individual infringement suits be brought in this Court against these defendants, on a contingent basis—three were filed in July 1979; three were filed in November 1979; two have been settled, and four remain to be settled and/or tried.

Although an unusually large amount of pretrial discovery has been had both in the Court of Claims and in this Court, many of the pertinent documents have disappeared and many of the material witnesses, including the inventors of the patents in suit, have suffered lapses of memory or otherwise have become unavailable.

While the causes are myriad, much of the blame is attributable to Potter's delay in filing these suits.

Potter's unsupported contention that laches is not applicable to suits at law[5] is inapposite to all the relevant authorities.

It is clear in the Fourth Circuit that the equitable doctrine of laches is applicable to suits brought solely at law. See *Giddens* v. *Isbrandtsen Co.*, 355 F.2d 125 (4th Cir. 1966). Similarly, laches has expressly been held applicable to patent infringement actions. *TWM Manufacturing Co., Inc.* v. *Dura Corporation*, 592 F.2d 346 (6th Cir. 1979); *Baker Manufacturing Co.* v. *Whitewater Manufacturing Co.*, 430 F.2d 1008 (7th Cir. 1970), *cert. denied*, 401 U.S. 956 (1971); *Union Shipbuilding Co.* v. *Boston Iron & Metal Co.*, 93 F.2d 781 (4th Cir. 1938); *Wolf Mineral Process Corp.* v. *Minerals Separation N.A. Corp.*, 18 F.2d 483 (4th Cir. 1927).

Laches may be invoked when the prejudice to the defendant caused by the plaintiff's unexcused delay in instituting suit outweighs the harm to the plaintiff caused by the acts of the defendant upon which the suit is predicated. It is sustainable upon proof of two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. See *Costello* v. *United States*, 365 U.S. 265 (1961).

In construing this two-pronged standard, Judge Albert V. Bryan, Sr., speaking for the Fourth Circuit, stated in *Giddens, supra*, that:

> . . . the presence of laches is ascertained by a balancing of the claimant's delay with the proferred excuse, if any, against the defendant's consequent detriment.

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[5] The plaintiff asserts that this consolidated action is an action at law rather than an action in equity because Potter seeks only monetary damages and no injunctive relief.

> The determination demands a weighing of equities. These in turn depend upon an assay of the circumstances. 355 F.2d 125, 127.

The length of delay constituting laches is generally analogized to a corresponding statute of limitations—but the laches period may be longer or shorter than the analogous statutory period, depending on the individual facts and circumstances of each case. *Giddens, supra,* at 127; *Gillons* v. *Shell Co. of California,* 86 F.2d 600 (9th Cir. 1936), *cert. denied,* 302 U.S. 689 (1937).

Although there is no express statute of limitations for patent infringement suits, 35 U.S.C. § 286 limits a patentee's recovery in a patent infringement action to the six-year period immediately preceding the filing of the suit. *TWM Manufacturing Co., supra,* at 348.

The time when the patentee gains knowledge—either actual or constructive—of the alleged infringement triggers the running of the laches period. *TWM Manufacturing Co., supra,* at 348; *Dymo Industries* v. *Monarch Marking Systems,* 474 F.Supp. 412, 414 (N.D. Tex. 1979)—the period stops when the patentee files suit against the alleged infringer.

Potter filed suit in this Court against these defendants for their alleged commercial infringement of the '894 and '685 patents in 1979. Its 1978 suit against the United States in the Court of Claims alleging that the defendants' products infringed its '894 and '685 patents was for governmental infringement only. The Court of Claims' suit did not toll the running of the laches period against these defendants for commercial infringement. See *TWM Manufacturing, supra,* at 349.

Where there has been an unreasonable delay by a patentee in bringing suit for infringement of his patent, there is a presumption that the alleged infringer has been pre-

judiced by the delay. The weight of authority indicates that delays in excess of six years in bringing such suits are presumptively unreasonable—and shifts the burden of proof to the patentee plaintiff to show a legally cognizable excuse for the delay.

This rule has been in existence at least since its promulgation by the Ninth Circuit in *Gillons* v. *Shell Co. of California,* 86 F.2d 600 (9th Cir. 1936), *cert. denied,* 302 U.S. 689 (1937). In 1970, the Seventh Circuit in applying laches to bar a patent infringement suit delayed for seven years after notice of infringement, cited *Gillons* with approval. *Baker Manufacturing Co.* v. *Whitewater Manufacturing Co.,* 430 F.2d 1008 (7th Cir. 1970), *cert. denied,* 401 U.S. 956 (1971).

While the Fourth Circuit has not specifically addressed the six-year rule, this presumption has been adopted by the Second,[6] Sixth,[7] and Tenth [8] Circuits by the district court in the Fifth[9] and District of Columbia Circuits [10]—and by this Court, and counsel has been so advised.

The plaintiff was given every opportunity to justify its long delay in bringing these infringement suits and they failed to so do.

The undisputed evidence clearly shows that Potter delayed bringing suit against these defendants for infringement of the '894 patent for more than six years after it

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[6] *Jones* v. *Ceramco, Inc.,* 387 F.Supp. 940 (E.D.N.Y. 1975), *aff'd* 526 F.2d 585 (2nd Cir. 1975).

[7] *TWM Manufacturing Co., Inc.* v. *Dura Corporation,* 592 F.2d 346 (6th Cir. 1979).

[8] *Maloney-Crawford Tank Corp.* v. *Rocky Mountain Natural Gas Co.,* 494 F.2d 401 (10th Cir. 1974).

[9] *Dymo Industries, Inc.* v. *Monarch Marking Systems,* 474 F. Supp. 412 (N.D. Tex. 1979).

[10] *Van't Veld* v. *Honeywell,* 440 F.Supp. 1020 (D.D.C. 1979).

had knowledge of the alleged infringement by these defendants.

Potter's attempt to excuse this delay on the grounds they were negotiating with the defendants in re-licensing and were in the process of suing another company (Bucode) for infringement of the '894 patent—and their precarious financial condition—are simply not supported by the evidence.

Potter failed to call any of its corporate officers, many of whom were available, except its present president, to explain why their so-called licensing offers were rejected or why they delayed filing infringement suits against these defendants. None of Potter's office memoranda or copies of its correspondence in re these negotiations were offered in evidence. The correspondence in evidence came from the defendants' files. All the defendants denied they were infringing the '894 patent. That must have ended the matter as far as Potter was concerned because they did nothing to stop any of the defendants from continuing to manufacture and sell their machines. Although Potter's present president was not with the Company until late 1974, he offered no explanation as to why these suits were not filed until late 1979—except that he was too engrossed in keeping the Company financially afloat to look into the matter before then.

However one characterizes these licensing negotiations, they terminated more than six years before these infringements suits were filed.

Similarly, Potter's maintenance of the Bucode litigation does not constitute a legally cognizable excuse for Potter's delay in suing these defendants for infringement of its '894 and '685 patents. Other patent infringement litigation brought by a patentee does not excuse a delay in suing other defendants for infringing the same patent. *Advanced Hydraulics, Inc.* v. *Otis Elevator Company*, 525 F.2d 477 (7th Cir. 1975), *cert. denied*, 423 U.S. 869 (1975).

The bald knowledge that a patentee has sued other companies for patent infringement does not impute knowledge of the patentee's intention to sue all infringers for patent infringement—even if the patents in suit are identical. At the very least, at some time during the course of the Bucode litigation, Potter should have notified the defendants of its intention to sue them for infringing its '894 patent upon obtaining a favorable resolution of the Bucode case. *American Home Products Corp.* v. *Lockwood Manufacturing Co.*, 483 F.2d 1120 (6th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974).

For the period from 1975 up until these suits were filed in 1979, Potter cites its financial difficulties as its primary reason for failing to sue. However, except in unusual circumstances, poverty is ordinarily no excuse for delay in filing suit. A party's poverty or pecuniary embarrassment is not a sufficient excuse for unreasonably postponing the assertion of its legal rights. *Hayward* v. *National Bank*, 96 U.S. 611 (1877); *Leggett* v. *Standard Oil Co.*, 149 U.S. 600 (9th Cir. 1936), *cert. denied*, 302 U.S. 689 (1937).

The plaintiff offers no excuse for its failure to timely sue the defendants under the '685 patent—its position with respect to this patent is that there was no presumptive unreasonable delay, with the possible exception of STC—the period of delay being less than six years.

Nevertheless, laches should be applied where the delay has been less than six years if the facts and circumstances so warrant—if the defendants have suffered enough prejudice from the delay. This policy was enunciated by the Fourth Circuit in *Fretwell* v. *Gillette Safety Razor Co.*, 106 F.2d 728 (4th Cir. 1939), recognized in *Giddens* v. *Isbrandtsen Co.*, 355 F.2d 125 (4th Cir. 1966), and exemplified in *Advanced Hydraulics, Inc.* v. *Otis Elevator Co.*, 525 F.2d 477 (7th Cir. 1975), *cert. denied*, 423 U.S. 869 (1975).

The Court finds from the evidence that the defendants have been seriously and irreparably prejudiced by the plaintiff's delay in filing this consolidated patent infringement suit. Prejudice "contemplates the dispersal and inaccessibility of witnesses, the dimming of recollections and other disadvantages incident to the lapse of time." *Giddens* v. *Isbrandtsen,* 355 F.2d 125, 127 (4th Cir. 1966). The facts are clear that, as a result of the long delay in the filing of these suits, many crucial documents, including the inventor's files, have become lost or been destroyed, and several crucial witnesses, including the inventors of the patents in suit, have either died or suffered lapses of memory. In addition, many of Potter's corporate records which are relevant to the defendants' case have been destroyed due to the ravages of time. This type of prejudice—the loss of relevant evidence—is clearly of the type upon which laches can be supported. See *Dymo Industries, Inc.* v. *Monarch Marking Systems,* 474 F.Supp. 412, 416 (N.D. Tex. 1979).

None of the defendants have included any possible royalty costs in the sale or lease of their machines. All claimed they were lulled into believing, by Potter's inaction, that their products were not infringing upon any of Potter's patents.

All testified they could and would have circumvented Potter's patent claims, had they been timely sued for infringement. The costs to so do now on the machines in place would be both prohibitive and impractical.

Further, the Court is of the opinion that Potter ought to be estopped from bringing an infringement action against these defendants under the '685 patent.

Estoppel is proper where "one has . . . acted to mislead another and the one thus misled had relied upon the action of the inducing party to his prejudice." *Advanced Hydraulics, supra,* at 479. Potter actively participated with the ANSI Subcommittee in developing GCR as the industry standard—it intentionally failed to bring its ownership of

the '685 patent to the committee's attention notwithstanding he committee's policy to the contrary. By so doing, Potter has gained a monopoly on the GCR industry standard without any obligation to make its use available on reasonable terms to competitors in the industry.

Equity will rarely, if ever, permit one to waive by acquiescence its alleged patent rights, for a long period of time [11] and attempt to assert them after they have been adopted as the industry standard.[12]

Whatever right the plaintiff has to enforce its delayed infringement claims against these defendants will not be impaired by the dismissal of this consolidated suit—the defendants are the real parties-in-interest in the plaintiff's pending suit in the United States Court of Claims—all available discovery has been completed and the Court of Claims' action is now ready for hearing on the merits as soon as that Court's docket permits.

Surely the defendants ought not to be put to the extra expense of defending the same claims in two federal courts.

The Order dismissing the above-styled suits was entered herein on March 12, 1980, with the Court's findings and conclusions to follow.

The Clerk will send a copy of these findings and conclusions to the Honorable Francis C. Browne of the United States Court of Claims, and to all counsel of record.

/s/ Oren R. Lewis
United States Senior District Judge

March 25, 1980

A True Copy, Teste:
W. Farley Powers, Jr., Clerk
By /s/ Maria Heurtt
Deputy Clerk

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[11] ANSI Subcommittee X3B1—November 1973.

[12] The GCR recording was adopted as the industry-wide standard in June 1976.

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v.

CONTROL DATA CORPORATION, *Defendant*.

ORDER

(Filed May 23, 1980)

THIS CAUSE came on to be heard on the 16th day of May 1980 and was argued by counsel.

1. Upon hearing plaintiff's Motion for Rehearing and considering the arguments of counsel, the Motion is denied;

2. Upon plaintiff's motion that an appeal bond be set, it is ordered that the appeal bond for a consolidated appeal is three thousand five hundred dollars ($3,500.00);

3. Upon consideration of defendants' Storage Technology Corporation, Sperry Corporation and Telex Computer Products, Inc., Motion for Voluntary Dismissal of their Counterclaims without prejudice to reinstate the counterclaims in the events these actions are remanded to this Court for a trial on the merits;

4. ORDERED, that Defendants' Joint Motion for Voluntary Dismissal without prejudice should be and hereby is granted;

5. This order is without prejudice to any of the rights of the parties in the Court of Claims Docket No. 111-78;

ENTERED at Alexandria, Virginia, this 23rd day of May 1980.

/s/ OREN R. LEWIS
Oren R. Lewis
District Court Judge

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By /s/ RUTH WARDMAN
Deputy Clerk

SEEN AND AGREED

WILLIAM O. BITTMAN, ESQUIRE
Attorney for Defendant
Storage Technology Corporation

IN THE UNITED STATES DISTRICT COURT
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MOTION FOR REHEARING

Now Comes the plaintiff, Potter Instrument Co., Inc., (PICO), and respectfully moves this Honroable Court for a rehearing pursuant to FRCP Rule 59 with respect to the matters set forth in the Order dated March 12, 1980, dismissing the above-identified cases on the grounds of laches and equitable estoppel.

This rehearing is requested on the ground that the Court has committed a manifest error of fact and law. However, since the undersigned has not received findings of fact and conclusions of law (see Footnote No. 1 to the Order), PICO is unable to fully state its grounds at this time. For the same reason, PICO is unable to file its brief at this time. Likewise, no specific date is requested for a hearing on this matter.

In summary, PICO respectfully requests rehearing and gives notice that it will set this down for oral argument after filing and service of its brief.

Respectfully submitted,

/s/ David R. Murphy
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Date: 3-19-80

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REVISED MOTION FOR REHEARING AND TO VACATE SUMMARY JUDGMENT

Now Comes the plaintiff, Potter Instrument Co., Inc., (PICO) and submits its revised Motion for Rehearing and to Vacate Summary Judgment under Rule 59(e) of the Federal Rules of Civil Procedure.

Since the plaintiff has now had the opportunity to study the Court's Findings of Fact and Conclusions of Law, filed March 25, 1980, it is now in a position to state more fully the grounds on which it moves the Court for a rehearing and to vacate summary judgment:

(a) There are genuine disputes as to material facts and factual inferences rendering summary judgment inappropriate (FRCP 56(c));

(b) The Court has misapprehended the significance of certain evidence;

(c) There is insufficient evidence to support the Court's conclusions of fact;

(d) The Court has made manifest errors of fact;

(e) The Court has made manifest errors of law.

A Brief in Support of Plaintiff's Motion for a Rehearing and to Vacate Summary Judgment will be filed shortly.

Respectfully submitted,

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Date: 4-4-80

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Civil Action No. 79-995-A

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CONTROL DATA CORPORATION, *Defendant*.

JOINT MOTION TO STRIKE PLAINTIFF'S MOTION FOR REHEARING

Come now the Defendants in the above-styled actions and move this Court to strike Plaintiff's Motion for Rehearing on the grounds that it was filed out of time.

As set forth more fully in Defendants' accompanying Memorandum of Points and Authorities, Rule 59(e), Fed. R. Civ. P. under which Plaintiff seeks to alter or amend the judgment of this Court requires that it have served its request for rehearing not later than ten days after entry of judgment. However, Plaintiff, in what has become a continuing pattern of dilatoriness, did not file a perfected motion for rehearing until over a month after the 10 days provided for in Rule 59(e).

Because Rule 6(b)(2) of the Fed. R. Civ. P. does not permit any extension of time for filing a motion under Rule 59(e) it is respectfully submitted that Plaintiff's motion must be striken.

Respectfully submitted,

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Control Data Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 79-579-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

STORAGE TECHNOLOGY CORPORATION, *Defendant*.

Civil Action No. 79-626-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

TELEX COMPUTER PRODUCTS, INC., *Defendant*.

Civil Action No. 79-993-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

TELEX COMPUTER PRODUCTS, INC., *Defendant*.

Civil Action No. 79-994-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

SPERRY CORPORATION, *Defendant*.

Civil Action No. 79-995-A

POTTER INSTRUMENT COMPANY, INC., *Plaintiff*,

v.

CONTROL DATA CORPORATION, *Defendant*.

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NOTICE OF APPEAL

Notice is hereby given that the plaintiff, Potter Instrument Co., Inc. (PICO) hereby appeals to the United States Court of Appeals for the Fourth Circuit from:

(a) the ORDER entered March 12, 1980 in the above-identified consolidated cases; and

(b) the FINDINGS AND CONCLUSIONS entered March 25, 1980 in the above-identified consolidated cases; and

(c) for the ORDER entered May 23, 1980 in the above-identified consolidated cases, which order denied the relief requested in PICO's motion for a rehearing based on the Order of March 12, 1980, and the Findings and Conclusions of March 25, 1980.

This appeal is taken pursuant to 28 USC 1291 since the dismissal in the May 23, 1980 Order is a final order.

This appeal is taken pursuant to the Federal Rules of Appellate Procedure in general and Rules 3 and 4 in particular.

Check number 10872 in the amount of $70.00 is attached to this Notice of Appeal and is being tendered to the Clerk of the District Court concurrently with this Notice of Appeal.

Respectfully submitted,

/s/ DAVID R. MURPHY
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Date: 6-19-80

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1419

POTTER INSTRUMENT COMPANY, INC.,
Appellant,

- against -

CONTROL DATA CORPORATION,
Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia,
Alexandria Division

APPELLEE'S MOTION TO DISMISS APPEAL

Now comes appellee and moves the Court to dismiss the appeal in Civil Action No. 79-995-A *Potter Instrument Co., Inc.* v. *Control Data Corporation,* U.S. District Court for the Eastern District of Virginia, Alexandria Division, on the ground that the appellant did not file a notice of appeal within the time required under Federal Rule of Appellate Procedure 4(a) and 28 USC 2107. This Court therefore lacks jurisdiction to entertain the appeal.

As set forth more fully in Appellee's attached memorandum in support of this motion, appellant did not file a perfected motion for rehearing in compliance with Federal Rule of Civil Procedure 7(b) until over a month after the 10 days provided for in Federal Rule of Civil Procedure 59(e).

Since appellant had not taken its appeal within thirty days from the entry of judgment, nor served a proper and

timely motion for a new trial, its right to appeal is lost.

/s/ Allen Kirkpatrick
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July 1, 1980